TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]. 1910.

No. 66.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

LUCINDA GRIZZARD, WILLIAM GRIZZARD, MRS. LILA CHANEY, AND WILSON CHANEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED SEPTEMBER 12, 1908.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 252.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

LUCINDA GRIZZARD, WILLIAM GRIZZARD, MRS. LILA CHANEY, AND WILSON CHANEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

INDEX.

2 THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
LUCINDA GRIZZARD ET AL., DEFENDANTS IN ERROR.

Writ of error from the Circuit Court of the United States for the Sixth Judicial Circuit and Eastern District of Kentucky, at Richmond, Kentucky, to the Supreme Court of the United States of America.

Honorable, A. M. J. Cochran, district judge. J. H. Tinsley, United States attorney, Covington, Kentucky. W. S. Moberly, attorney for defendants in error.

1 Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit and Eastern District of Kentucky, at a regular term begun and held at Federal Court Hall in the City of Richmond, Kentucky, on Monday, April 27", A. D. 1908, and of the Independence of the United States of America the 132" year.

Court met. Present: Honorable A. M. J. Cochran, Judge.

LUCINDA GRIZZARD, WM. GRIZZARD, MRS. LILA CHANEY, Wilson Chaney, plaintiffs.
vs.
THE UNITED STATES, DEFENDANT. } No. 44.

Be it remembered that heretofore, to wit, on January 31", A. D. 1905, a petition was filed herein, same being in words and figures as follows, viz:

2 In the Circuit Court of the United States, Sixth Circuit, and Eastern District of Kentucky.

LUCINDA GRIZZARD, WM. GRIZZARD, MRS. LILA CHANEY, Wilson Chaney, plaintiffs.
vs.
THE UNITED STATES, DEFENDANT. } No. 44.

To the Honorable judges of the Circuit Court of the United States in and for the Eastern District of Kentucky:

Lucinda Grizzard and Wm. Grizzard, of Madison County Ky., and Lila Chaney, and her husband, Wilson Chaney, of Fayette County, Ky., bring this bill against the United States. And thereupon your orators complain and say that Joseph S. Grizzard departed this life on January, 1902, intestate and the owner in fee simple of the tract of land hereinafter described; that Lucinda Grizzard was his wife and is now his surviving widow, and that he left Wm. Grizzard and Lila Chaney his only children and heirs at

law, and that Wilson Chaney is the husband of Lila Chaney. T
say that Lucinda Grizzard as the widow of Joseph S. Grizzard
the use of and the benefits accruing from the land herein describe
a homestead during her life and at her death it goes in fee simpl
Wm. Grizzard and Lila Chaney as the heirs of Joseph S. Grizz
and they say that the parties hereinabove named are now in
actual possession of said land, which is situated near Valley View
Madison County, Kentucky, on the waters of Tates Creek, waters
the Kentucky River, and near the mouth of said creek and boun
as follows, to wit:

3 Beginning at a stake in the middle of Tates Creek; the
up the creek in the middle of same to a point where an
tree formerly stood at the base of a hill; thence an old line and e
of the slack water S. 59 W. 450 ft., S. 42 E. 1320 ft. to a point
the west side of county road near the ford; thence a new line
the edge of the slack water N. 44 E. 250 ft. to a stake on the no
bank of the creek above the house; thence following the edge of
water N. 60 W. 184 feet, N. 53 W. 470 feet, N. 16 E. 200 ft., N.
W. 530 ft. to a point on the bank of the creek where an elm forme
stood; thence down the creek following the base of the hill to
place of beginning, containing 8-8/10 acres by survey and plat he
with filed and made a part hereof.

They say that said land was extremely fertile and productive, a
was for many years used for agricultural purposes and was so u
by your orators at all times hereinafter complained of. They
that the Kentucky River is a navigable stream, and accessible fr
States other than that in which it lies, and, therefore, within the c
stitutional powers of Congress over navigable waters of the Unit
States; that the Government of the United States, in the lawful ex
cise of its authority, and pursuant to an act of Congress for the p
pose of improving the navigation of said Kentucky River, built a
constructed, and on the 15th day of December, 1903, completed a lo
and dam eighteen (18) feet high in and across the said Kentuc
River just below the village of Valley View in Madison County, K
and about ¼ mile below the mouth of Tates Creek in Madis

4 County, Ky.; which lock and dam is known as "Lock a
Dam No. 9," in Kentucky River; and that the United Stat
in the exercise of its authority, and pursuant to an act of Congre
as aforesaid, has at all times since the completion of the said lo
and dam as aforesaid, maintained said lock and dam, and there
raised the level of the water of said Kentucky River in its natur
channel above its original and normal height 18 feet, causing a
forcing the waters in and from the main channel of said river
flood and run back into the channel of Tates Creek, and flow, spre
out, cover, stand upon, and permanently flood the lands adjacent
said creek, including the land herein above described belonging
your orators, and thereby rendering the said land wet, boggy, an
wholly unfit for agricultural or residence purposes, the purposes fo

MAPS

TOO

LARGE

FOR

FILMING

which said land had always theretofore been used, and unfit and unsuitable for any purpose whatever known to your orators and of no value whatever to them.

They say that said land, situated as it was and as it had always theretofore been, was worth to your orators the sum of one hundred and fifty ($150.00) dollars per acre, and that was a reasonable value for same before it was flooded as hereinbefore stated; that by reason of the authority exercised by the United States as aforesaid, in building, operating, and maintaining said lock and dam in and across the Kentucky River, as hereinbefore set out, at the point where same is located and the consequent raising of the level of the water in the main channel of said Kentucky River and in Tates Creek, and causing the same to flow back upon their land and permanently flood said land and render it unfit for use and of no value, they have been thereby wholly deprived of the use of said land for any purpose, and thereby damaged in the sum of $1,320.00, the value of said land.

For as much as your orators can have no adequate relief except in this court, and to the end therefore that justice may be done between them and the United States, they pray that this honorable court take jurisdiction of this case and that, based upon the law and the facts of the case your honors may adjudge that they recover of the United States the sum of $1,320.00 and their costs herein expended and for all other proper relief.

JACKSON & ROBERTS,
Attorneys for Lucinda Grizzard and the other Complainants.

UNITED STATES OF AMERICA, *Eastern District of Kentucky, Set.*

On 31" day of Jan., 1905, before me appeared Wm. Grizzard, one of the complainants above named, who, being duly sworn, deposes and says that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same are true of his own knowledge.

WM. GRIZZARD.

Subscribed and sworn to before me this 31" Jan., 1905.

JOS. C. FINNELL, *Clerk U. S. Courts,*
W. C. BENNETT, *D. C.*

And on the same day, to-wit, on January 31, 1905, the exhibit mentioned in the foregoing petition was filed herein, and was and is as follows, viz:

(Here follows map marked page 6.)

7 And on the same day, to-wit, on January 31, 1905, a certified copy of the foregoing bill of complaint was issued herein as a summons, and was afterwards, to-wit, on February 2, 1905, returned and filed, endorsed as follows, viz:

"Received the within petition at Covington, Kentucky, February 1st, 1905. Executed same by delivering a true copy of same to J. H.

Tinsley, U. S. district attorney, in Covington, Ky., this 1st day of February, 1905.

S. G. SHARP, *U. S. Marshal.*"

Marshal's fees $2.00.

And on a day following, to-wit, on April 10, 1905, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This day comes the defendant by its attorney, J. H. Tinsley, and moves the court to grant him till the 1st day of Oct., 1905, to answer herein, for the reason that surveys cannot be made by the United States until during a low stage of water in Kentucky River. The court takes time on said motion till the 1st day of Richmond term of this court.

And on a day following, to-wit, on April 24, 1905, an order was made and entered herein, same being in words and figures as follows, viz:

8 *Order.*

This cause coming on to be heard, came the defendant by J. H. Tinsley, its attorney, and on his motion time is given until the 1st day of October to file answer herein, and by consent of parties, the court being advised, it is now ordered that this case be, and same is, continued generally until the next regular term of this court.

And on a day following, to-wit, on November 13, 1905, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This cause coming on to be heard, came the parties by their respective attorneys, and upon their joint motion, the court being advised, it is now ordered that this case be, and same is, continued until the next regular term of this court.

And on a day following, to-wit, on November 12, 1906, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

By consent of parties, the court being advised, it is now ordered that this case be, and same is, continued generally until the next regular term of this court.

9 And on a day following, to-wit, on February 8, 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This cause coming on to be heard, upon the application and motion of S. Parish for an allowance to him as commissioner appointed by

the court to view the land in controversy in this action, and it appearing to the court that one day was occupied in said service, and that said Parish expended the sum of seventy cents in railroad fare, it is now ordered that he receive in full for his services and expenses herein the sum of five dollars and seventy cents to be taxed as general costs in the case by the clerk.

And on a day following, to-wit, on April 25, 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This day came defendant by J. H. Tinsley, attorney, and filed its answer herein. Came plaintiff by her attorney and filed reply to defendant's answer.

And on the same day, to-wit, on April 25, 1907, the answer mentioned in the foregoing order was filed herein, same being in words and figures as follows, viz:

Circuit Court of the United States, Eastern District of Kentucky.

LUCINDA GRIZZARD ET AL., PLAINTIFFS,
vs.
UNITED STATES OF AMERICA, DEFENDANT. } Answer.

Comes now the attorney for the United States in and for the Eastern District of Kentucky, and for answer to the petition of the plaintiffs, filed herein on Feb. 1st, 1905, says that he has no knowledge or information sufficient to form a belief as to whether the plaintiffs are the legal heirs of Joseph Grizzard, deceased, or as to whether they are the owners or in possession of a tract of land described in the petition, or any part of it, lying on the waters of Tates Creek, near the mouth of said creek. He admits the erection of a lock and dam described in the petition and admits that it raised the water of the Kentucky River 18 feet above its ordinary level and that same caused the waters of Tates Creek to back up and overflow, but he denies that 8–8/10 acres of said land or that any more than 4–62/100 acres of said lands as described in the petition is permanently overflowed by reason of said dam and during the ordinary stage of water therein. He says on information and belief that 3–54/100 acres of said land, so permanently overflowed, is cultivatable and that 1–8/100 acres of said land so overflowed is uncultivatable and unfit for cultivation. He denies, on information and belief, that said land so overflowed is worth $150.00 per acre or anything near that sum or that $150.00 per acre was a reasonable value for same before
11 said land was flooded. He denies that the plaintiffs have been damaged by such overflow in the sum of $1,320.00 or any sum in excess of $50.00. He denies that 8–8/10 acres of said land

or any more than 4-62/100 acres of same has been rendered wet, boggy, or wholly unfit for agriculture or resident purposes by reason of such overflow.

Wherefore, having fully answered, he prays the court to protect the rights of the United States and to render judgment in favor of the plaintiffs, if they show themselves entitled to the same, for only such sum of money as will compensate them for the reasonable value of the land permanently overflowed by reason of the construction of the said lock and dam. And for all proper relief.

J. H. TINSLEY,
U. S. Attorney.

And on the same day, to-wit, on April 25, 1907, the reply mentioned in the foregoing order was filed herein, same being in words and figures as follows, viz:

Circuit Court of the United States, Eastern District of Kentucky.

LUCINDA GRIZZARD ET AL., PLAINTIFFS,
vs.
UNITED STATES OF AMERICA, DEFENDANT. } Reply.

Comes now the plaintiffs in the above styled action, and for
12 reply to so much of the answer filed herein as they are informed or advised is necessary for them to reply to, deny that 1-8/100 acres of said land mentioned and described in the bill or petition herein, or any portion or part thereof, is uncultivatable or unfit for cultivation, as charged and alleged in the answer herein.

Wherefore the plaintiffs, having replied as fully as they are advised is necessary for them to do, pray that the answer of the defendant be dismissed; and that they be granted the relief and given the judgment prayed for in their petition herein.

W. S. MOBERLY,
Attorney for the Plaintiffs.

And on a following day, to wit, on April 27, 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This day came the plaintiff by her attorney and tendered and offered to file an amended petition, to the filing of which defendant by its attorney, J. H. Tinsley, comes and objects. The court overrules said objection and allows said amended petition to be filed, to which ruling defendant excepts.

And on the same day, to wit, on April 27, 1907, the amended petition mentioned in the foregoing order was filed herein, same being in words and figures as follows, viz:

12 Circuit Court of the United States, Eastern District of Kentucky.

LUCINDA GRIZZARD, &C., PLAINTIFF,
vs.
UNITED STATES, DEFENDANT. } Amended petition.

Come now the plaintiffs and by leave of the court amend their original petition herein, and say their farm on Tates Creek, in Madison Co., Ky., contains 86 acres; and is shown on plat filed with their petition herein.

They say the county road leading from their road around the house to the Tates Creek Turnpike is a valuable appurtenance to their land; they say that said county road goes through the boundary of land submerged, and the same is thereby totally destroyed by reason of the fact it is covered with water; and they can not use same at any time of the year; they say that the salable value of their said farm is injured and lessened to the extent of $1,500.00 by reason of the said destruction of said part of said county road.

Wherefore, they pray as in their original petition and for the additional sum of $1,500.00, and for all other and general relief.

W. S. MOBERLY,
Attorney for Plaintiffs.

14 And on a day following, to wit, on April 30, 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This day came the defendant and files its demurrer to amended petition of plaintiff heretofore filed herein. The court being advised, overrules said demurrer, to which ruling defendant, by its attorney, comes and excepts. It is agreed that all affirmative allegations of plaintiffs' petition and amended petition be, and same are, traversed of record.

And on the same day, to wit, on April 30, 1907, the demurrer mentioned in the foregoing order was filed herein, same being in words and figures as follows:

United States Circuit Court, Sixth Circuit, and Eastern District of Kentucky.

LUCINDA GRIZZARD ET AL., PLAINTIFFS,
vs.
THE UNITED STATES, DEFENDANT. } Demurrer.

Comes now the defendant, The United States, by J. H. Tinsley, U. S. attorney, and demurs to the amended petition filed herein April 27, 1907.

Because the facts stated in said amended petition are not
15 sufficient to constitute a cause of action against defendant or to uphold a recovery by reason of destruction of county road, or injury to land by reason thereof.

Wherefore, it prays as in original answer.

J. H. TINSLEY,
U. S. Attorney.

And on the same day, to-wit, on April 30, 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This cause coming on to be heard, came the plaintiff, having as her attorney Wm. S. Moberly. Came also the defendant, having as its attorney J. H. Tinsley, both sides having announced ready, and the cause being heard by the court, came the plaintiff and introduced her evidence, and, having announced through, came the defendant and introduced its evidence, and plaintiff having no evidence in rebuttal, the case is submitted to the court on the law and the facts and both sides have leave to file briefs.

And on a day following, to wit, on November 11, 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This cause coming on to be heard and having been submitted to the court upon the law and the facts, the court having considered same and being now advised, files its findings of facts and conclusions of law and is of the opinion that submission should be set aside,
16 and further evidence heard upon the question of the amount of plaintiff' land actually taken and it is so ordered.

The court is further of the opinion that the matter should be referred to a commissioner to inform the court accurately upon this point. There being no objections by either plaintiffs or defendant, it is ordered by the court that S. Parish and Col. A. M. Campbell be and they are appointed to make a proper investigation and report same to the court.

And on the same day, to wit, on November 11, 1907, the opinion of the court mentioned in the foregoing order was filed herein, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

LUCINDA GRIZZARD & AL., PLAINTIFFS,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

It is impossible from any legal proof submitted in this case to determine accurately how much land is permanently injured by the

erection of the dam complained. The plaintiffs introduced a plat made by a surveyor named Parish, from which it appeared that on May 13, 1904, eight and eight-tenths acres of plaintiffs' bottom land was submerged by the water as it stood on that date. But it nowhere appears how high the water was on that date, nor as to the
17 likelihood of such a heighth of water recurring every year so as to prevent cultivation. All that appears is that it was then considerably higher than it was last May when the evidence was heard, and that the land had not been cropped since the erection of the dam.

The correctness of the map, and the truth of the facts which it shows, was not established by any one who was in position to speak in regard thereto. The surveyor was not introduced as a witness and none of the witnesses introduced were in position to speak in regard thereto.

On the other hand, Col. Campbell testified that the map did not correspond with plaintiffs' deed—that at the average level of the river, which was two feet nine inches above the top of the dam, the water covered about three acres of the cultivated land, and at a heighth of five feet it would cover three and fifty-four hundredths acres. I hesitate to accept the testimony of Morgan and Col. Campbell on the subject of how much of plaintiffs' land is submerged, for fear that they were not in a position to know exactly what was plaintiffs' land, as no one was along when the government survey was made to indicate what land plaintiffs claimed.

The submission of the case is set aside in order that evidence may be introduced to inform the court accurately on this subject. Perhaps the best way would be to appoint a commission for the purpose. If no objection is made, I would appoint Mr. Parrish and Mr. Morgan, or Col. Campbell.

Another matter in the case needs elucidation. One of the claims asserted in the case is on account of the submerging of the county road, and much is made of this. The case was heard on this branch of it on the assumption that the only way in which plaintiffs could get to Valley View without crossing the water was by going
18 around a distance of three or four miles. Now it appears from the Parrish map that a road is proposed to leave the county road just back of plaintiffs' premises and run east thereof until it strikes the turnpike beyond the point where it crosses the creek, thereby avoiding the obstruction in the county road where it is submerged as it passes through plaintiffs' land. On the hearing of the case no reference was made to this proposed road. It may be that this is entirely possible and the obstruction can be avoided without much or any expense to plaintiffs. The surveyor seems to have been imbued with the idea as to its feasibility, and for some reason no claim was asserted on this account until long after this suit was brought. The assertion thereof seems to have been an afterthought.

This matter should be investigated and the exact truth in regard to it ascertained.

An order will be entered setting aside the submission of this case.

A. M. J. COCHRAN, *Judge.*

Nov. 11, 1907.

And on a day following, to wit, on February 6, 1908, an application and motion was filed herein, same being in words and figures as follows, viz:

19 At the last term of the Federal Court at Richmond, I was appointed commissioner to go with Albert M. Campbell, U. S. assistant engineer, to examine the farm of Lucinda Grizzard at Valley View, Madison County, Ky., to determine the actual area of land submerged or otherwise rendered unfit for cultivation by reason of the backwater caused by the construction of Dam No. 9 on the Kentucky River. We visited the farm on the 27th day of November, 1907, and made a report of same. I paid out 70 cents rail road fare and was engaged one day. Where do I get my pay, and how much am I entitled to? I will be satisfied with whatever you see fit to allow me.

S. PARISH.

Feb. 3, 1908.

And on a day following, to wit, on February 8, 1908, the report of commissioners was filed herein, same being in words and figures as follows, viz:

UNITED STATES ENGINEER OFFICE,
ASSISTANT IN LOCAL CHARGE BIG SANDY RIVER IMPROVEMENT.
Louisa, Ky., November 27, 1907.

The Hon. J. H. TINSLEY,
U. S. Attorney,
Federal Building, Covington, Ky.

SIR: In accordance with your directions, we, the undersigned commissioners, on November 16, 1907, visited the farm of Lucinda Grizzard et al., on Tates Creek, Madison County, Ky., to determine the actual area of land submerged or otherwise rendered unfit for
20 cultivation by reason of the backwater caused by the construction of Dam No. 9 of the United States improvement of Kentucky River, and also to examine the roads and trails over which the owners of the farm must travel to and from the town of Valley View, their nearest market, post office, and school.

Having made the examination as directed, we have the honor to report as follows:

We agree that seven and one-half (7 1/2) acres of arable land are either permanently submerged or otherwise rendered unfit for cultivation by reason of their liability to being submerged, cut off or soaked by small freshets occurring during the cropping season. We found evidences that this amount of land had been submerged during the cropping season of 1907, when no crops upon it were attempted.

We agree that the greatest damage to the farm lies in the destruction, by backwater, of the ford across Tates Creek on the Forest Hill

road which leads to the Grizzard farm from the Tates Creek pike. It is about 650 feet from a point in the road in front of the Grizzard residence to the Tates Creek pike and the ford was located at about 450 feet from the pike. At present Mr. Grizzard keeps a small boat in which to cross the backwater when the current is not too swift, and there is no ice in the creek. This boat will only carry foot passengers. Mr. Grizzard is compelled to keep his vehicle on the south side of the creek and, when he wishes to use it, take his horse around over a trail by the mouth of the creek and over a lumber company's bridge, in all a distance of between two and three miles around. This trail is also used by his children in going to school when it is unsafe to cross the creek, and by other members of the family in going to
21 and from Valley View by foot. The distance to Valley View by this trail is about a mile and a quarter.

Previous to the construction of the dam the Grizzards were able, at most times, to reach by wagon the nearest point on the Tates Creek pike by traveling about 650 feet on the Forest Hill road. Now, to reach the same point on the pike (which is about one-half mile from Valley View), they have to travel about 3 3/4 miles, as follows:

Up road back of house	about	3/4 mile.
Along fairly good ridge road	"	3/4 "
Along fairly good creek road	"	1 1/2 "
Along pike	"	3/4 "
		3 3/4 "

The county road back of the Grizzard farm is very steep, rocky, and almost impassable for wagons with any economical load at all; indeed, it is doubtful whether much more than an empty wagon can be taken either up or down the road. When examined this road showed no evidence whatever of travel.

The " proposed road " to the eastward of the Grizzard farm, shown on map filed by claimants in the Grizzard suit for damages, and mentioned in Judge Cochran's opinion, is impracticable owing to the broken country and great cost. It has been examined by the county authorities and reported to be too expensive to consider. We do not think that the county authorities will ever consider the construction of the " proposed road " or the reconstruction of the hill road back of farm because of the great expense attached to either one, and because but two or three families would be accom'odated. For the same reasons it will not be economical to construct a bridge over Tates Creek on the Forest Hill road. If Mr. Grizzard continues to market his crop at Valley View or elsewhere, he will have to
22 operate a ferry boat across the backwater in front of his farm.

Very respectfully, your obedient servants,

S. PARISH, *Surveyor*,
ALBERT M. CAMPBELL,
U. S. Assistant Engineer,
Commissioners.

And on the same day, to wit, on February 8, 1908, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This cause coming on to be heard upon the application and motion of S. Parish for an allowance to him as commissioner appointed by the court to view the land in controversy in this action, and it appearing to the court that one day was occupied in said service and that said Parish expended the sum of seventy cents in railroad fare, it is now ordered that he receive in full for his services and expenses herein the sum of five dollars and seventy cents to be taxed as general costs in the case by the clerk.

And on a day following, to wit, on May 8, 1908, an opinion was filed herein, same being in words and figures as follows, viz:

23 United States Circuit Court, Eastern District of Kentucky.

LUCINDA GRIZZARD ET AL., PLAINTIFFS,
vs.
UNITED STATES, DEFENDANT. } Opinion.

Upon the evidence heard by me and the report of the commissioners, Parrish and Campbell, I make the following findings of fact herein:

1. That plaintiffs' land contains 86 acres in all, of which 16 acres are bottom land and 70 upper land.

2. That of the bottom land 7½ acres are taken by the construction of Dam No. 9 on Kentucky River.

3. That in addition there is taken an easement of access from plaintiffs' land by way of the county road to the Tates Creek pike.

4. That the whole land was worth $3,000 before said taking, and what was left after the taking was worth $1,500.

5. I divide the damage by reason of the taking between the land taken and the easement of access taken equally, i. e., I allow $750 for the land taken and a like sum of $750 for the easement of access taken.

I therefore conclude as a matter of law that plaintiffs are entitled to a judgment for $1,500.

A. M. J. COCHRAN, *Judge.*

May 8, 1908.

24 And on the same day, to wit, on May 8, 1908, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This cause having been heard and submitted to the court upon the law and the facts, the court having considered same and being now fully advised, files its findings of facts and conclusions of law herein.

Whereupon, it is ordered, adjudged, and decreed that the plaintiffs herein, Lucinda Grizzard, Wm. Grizzard, Mrs. Lila Chaney, and Wilson Chaney, have and recover of the defendant, the United States of America, for the land herein taken, to wit, seven and one-half acres, the sum of seven hundred and fifty ($750.00) dollars, and the further sum of seven hundred and fifty ($750.00) dollars for the damage caused by the taking of an easement of access from the plaintiffs' land. Said judgment is to bear legal rate of interest from date. And it is further ordered that the plaintiffs recover of said defendant their costs herein expended, to be taxed by the clerk.

Came the defendant, United States of America, by its attorney, Hon. J. H. Tinsley, and now excepts to the foregoing judgment.

25 And on a day following, to wit, on August 15, 1908, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This day came Honorable James H. Tinsley, United States attorney, and files petition for writ of error and assignment of error in this cause, praying this court that a writ of error may issue to the Supreme Court of the United States for the correction of the errors set forth in the said assignment of errors, and that a transcript of the record and proceedings and papers in this cause be made and filed in the Supreme Court of the United States.

The court having fully considered said petition and assignment, and being advised, now orders that same be and it is hereby allowed.

And on the same day, to wit, on August 15, 1908, the petition for writ of error mentioned in the foregoing order was filed herein, same being in words and figures as follows, viz:

26 In the Circuit Court of the United States for the Eastern District of Kentucky, held at Richmond, Kentucky, April term, 1908.

LUCINDA GRIZZARD ET AL., PLAINTIFFS, *vs.* THE UNITED STATES OF AMERICA, DEFENDANT.	Petition for writ of error.

And now comes J. H. Tinsley, U. S. attorney, for and on behalf of the United States, and says that on or about the 8th day of May, 1908, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the error so complained of, and that a transcript of the record,

proceedings, and papers in this cause, duly authenticated, may be sent to said court.

J. H. TINSLEY, *U. S. Attorney.*

Copy handed me this 19th day of August, 1908.

W. S. MOBERLY,
Attorney for Plaintiff.

Writ of error allowed.

A. M. J. COCHRAN, *District Judge.*

27 And on the same day, to wit, on August 15, 1908, as assignment of errors was filed herein, same being in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky, held at Richmond, Ky., April term, 1908.

LUCINDA GRIZZARD ET AL., PLAINTIFFS,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } Assignment of errors.

The defendant, by its attorney, J. H. Tinsley, in this action, in common with its petition for writ of error, makes the following assignment of errors which it avers occurred at the trial:

1. The court erred in allowing the amended petition to be filed of date April 27th, 1907.

2. The court erred in overruling demurrer to amend petition.

3. The court erred in determining that plaintiff's whole land was worth $3,000.00, and only worth $1,500.00 after the taking.

4. The court erred in allowing $750.00 for the easement of access alleged to have been taken.

5. The court erred in rendering judgment against the plaintiff for $1,500.00.

28 6. The court erred in allowing the plaintiff for anything above the land actually taken and overflowed, to wit, seven and one-half acres under value of $750.00.

J. H. TINSLEY,
United States Attorney.

Service of copy of the within assignments or error acknowledged before me this 19th day of August, 1908.

W. S. MOBERLY,
Attorney for Plaintiff.

Writ of error allowed.

A. M. J. COCHRAN,
District Judge.

And on the same day, to wit, on August 15, 1908, writ of error was issued herein and service of same acknowledged as shown by the original writ of error attached hereto.

And on the same day, to wit, on August 15, 1908, citation was issued herein, which citation was returned and filed on the 19th day of August, 1908, service acknowledged as shown by the original citation attached hereto.

29 *Writ of error.*

UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the honorable judges of the Circuit Court of the United States for the Eastern District of Kentucky, greetings:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Lucinda Grizzard et al., plaintiff, and the United States, defendant, a manifest error had happened to the great damage of the said United States, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 15th day of September next, in the said Supreme Court of the United States to be then and there held; that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of our Supreme Court, 15th day of August, 1908.

JOS. C. FINNELL,
Clerk Circuit Court of U. S.,
Eastern Dist. of Kentucky.

Allowed by—

A. M. J. COCHRAN,
Dist. & Acting Circuit Judge.

We acknowledge service of the within writ.

W. S. MOBERLEY,
Atty. for Plaintiff.

(Indorsed:) Lucinda Grizzard et al. vs. The United States. Writ of error. Filed Aug. 15, 1908. Jos. C. Finnell, clerk.

30 *Citation.*

The President of the United States to Lucinda Grizzard, William Grizzard, and Mrs. Lila Chaney and Wilson Chaney:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C.,

on the 15th day of September next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky, wherein the United States is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable A. M. J. Cochran, district and acting judge of the Circuit Court of the United States, this 15th day of August, 1908.

A. M. J. COCHRAN,
Dist. and Acting Circuit Judge.

We acknowledge service of the within citation this 19th day of August, 1908.

W. S. MOBERLEY,
Attorney for Plaintiff.

(Indorsed:) Lucinda Grizzard et al., vs. The United States. Citation. Filed August 19, 1908. Jos. C. Finnell, Clerk.

31 And on the same day, to wit, on August 15, 1908, præcipe for record was filed herein, same being in words and figures as follows, viz:

Eastern District of Kentucky, Richmond Division.

LUCINDA GRIZZARD ET AL.
vs.
UNITED STATES. } No. 44. United States Circuit Court.

To JOSEPH C. FINNELL,
Clerk of said court.

Please make transcript of record, including papers, pleadings, and orders, except the evidence, in the case of Lucinda Grizzard et al. vs. United States, No. 44, for the Supreme Court of the United States.

J. H. TINSLEY,
Attorney for United States.

32 UNITED STATES OF AMERICA,
Eastern District of Kentucky, set.

I, Jos. C. Finnell, clerk of the United States Circuit Court for the Sixth Judicial Circuit and Eastern District of Kentucky, at Richmond, do hereby certify that the foregoing 31 pages contain a complete transcript of the proceedings had in the case of Lucinda Grizzard et al. vs. the United States of America, No. 44, at Richmond, Kentucky, as called for by the præcipe for record filed by J. H. Tinsley, United States attorney, and copied on page 31 of this record, as the same appears from the records and files of this office.

Witness my hand as clerk, and the seal of said court, at Richmond, Kentucky, this 24″ day of August, A. D. 1908, and of the Independence of the United States of America the 133″ year.

[SEAL.] JOS. C. FINNELL, *Clerk.*

33 (Indorsed on cover:) File No. 21330. E. Kentucky, C. C. U. S. Term No. 252. The United States, plaintiff in error, vs. Lucinda Grizzard, William Grizzard, Mrs. Lila Chaney, and Wilson Chaney. Filed September 12th, 1908. File No. 21330.

[redacted]

In the Supreme Court of the United States.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
LUCINDA GRIZZARD, WILLIAM GRIZZARD, Mrs. Lila Chaney and Wilson Chaney.
No. 66.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was instituted under the provisions of the act of March 3, 1887 (24 Stats. L., 505), commonly known as the Tucker Act, the second section of which confers jurisdiction upon the circuit and district courts of the United States concurrently with that of the Court of Claims.

Defendants in error owned a farm in Madison County, Ky., containing 86 acres, more or less. On the south it was bounded by what is known as Tates Creek, a tributary to the Kentucky River. A county road, known as the Forest Hill road, coming generally

from a northeasterly direction, formed the eastern boundary of said farm, and after crossing a ford across Tates Creek continued south a few hundred feet to join with the Tates Creek pike.

For the purpose of improving its navigable capacity the United States Government, in December, 1903, constructed in and across the Kentucky River a lock and dam, known as "Lock and Dam No. 9," the effect of which was to raise and force back the waters of said river into Tates Creek and permanently overflow 7½ acres of the bottom lands of defendants in error and at the same time render Tates Creek unfordable at the point where it is crossed by the county road, by reason of the depth of the water standing therein.

There does not appear to have been any obstruction to traffic on the county road north of the ford, but those desiring to reach Tates Creek pike were obliged thereafter to use a small ferryboat maintained at the ford by defendants in error for foot passengers, and vehicles were required to pass in a more or less circuitous route, the distance being much greater than before the destruction of the ford.

The trial court rendered judgment for $750, the value of the 7½ acres of land permanently submerged or taken, and a like amount for the damage caused by the so-called taking of an easement of access from the land of defendants in error by way of the county road to Tates Creek pike. (Rec., 12, 13.)

THE ISSUE.

The assignments of error are addressed wholly to that portion of the judgment making allowance of $750 by way of damage for the destruction of the so-called easement in the county road. (Rec., 14.) No issue is raised as to the allowance for the 7½ acres of land permanently overflowed.

ARGUMENT.

NO TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT.

This suit is predicated upon that clause of the fifth amendment to the Constitution prohibiting the taking of "private" property for public use without just compensation.

The decisions are practically uniform in holding that the closing of a public highway, such as streets, roadways, alleys, etc., when done under and pursuant to authority conferred by a valid act, and where there has been no want of reasonable care or skill in the execution of the power, does not constitute a taking of *private property* within the meaning of the Constitution. This is especially true where ingress and egress to and from land has been closed in but one direction. At most, the damages arising therefrom have been held to be consequential and not actionable.

There is no similarity between the facts in the case at bar and those of *United States* v. *Welch*, decided by this court at the last term (217 U. S., 333). In the latter, Welch was the possessor of a right of way, or easement, over the land of one Sewell, which was

the only practical outlet to the county road, whereas in the case at bar the land abuts the county road, which, as heretofore stated, is obstructed in only one direction.

On the question of vacating or closing a street so as to cut off access to property in one direction, Lewis, in his work on Eminent Domain (3d ed., sec. 202), says:

> Whether one may recover compensation when the street in front of his property is closed or vacated between his property and the next connecting street on one side, so as to cut off access in that direction, while leaving access in front and in the other direction unimpaired, is one of the vexed questions of the law. A leading case on the question is that of *Smith* v. *Boston* (7 Cush., 254), decided by the supreme court of Massachusetts. The street on which the plaintiff abutted was vacated near to but not in front of his property. He had access in the other direction. The case was a petition for damages under the statute, which was as follows: "If damage shall be sustained by any persons in their property by the laying out, altering, or discontinuing any highway, the commissioners shall estimate the amount of damage sustained by such persons, and in their return shall state the share of each separately." "In estimating the damages sustained by any person in his property by the laying out, altering, or discontinuing of any highway, the jury shall take into consideration *all the damage done to the complainant*,

whether by taking his property or by injuring it in any manner, and they shall also allow, by way of set-off, the benefit, if any, to the property of the complainant by reason of such laying out, alteration, or discontinuance." The language of the statute could hardly be more comprehensive, but the court held that the plaintiff did not sustain damage within the meaning of the statute, though his property was depreciated in value by the discontinuance of the street. * * * This case has been approved and followed in many subsequent cases in the same court involving similar facts and has exerted a marked influence upon the law of the country. It is now the settled doctrine in Massachusetts that property is not damaged within the statute by the vacation of a street or highway unless it abuts upon the part of the street vacated or is cut off altogether from the general system of highways. The doctrine is admitted to be harsh in some cases, but is adhered to as affording a definite and practical rule and on the ground of *stare decisis* and the acquiescence of the legislature. Many other courts follow the Massachusetts doctrine and hold that when access to property is cut off in one direction by the vacation or closing of the street upon which it abuts, but may be had in the other direction, the property is not taken or damaged within the meaning of constitutions or statutes giving compensation. * * *

Keasy v. *City of Louisville* (4 Dana, 154) was an action on the case to recover damages. Plaintiff was the owner of a lot in Jefferson street, in the city of

Louisville, upon which he had erected a small house. Thereafter the city elevated the grade of the street about 3 feet, in consequence of which plaintiff was required to fill up his lot, reconstruct his house, and in other respects was subject to inconvenience and damage. The court, among other things, said:

> If the city possess the power to shut up Jefferson street, and should exercise it, the reclusion would subject the plaintiff and others also to much more inconvenience and actual loss than any which could have been occasioned by the elevation of the grade; but, the power conceded, a legal right to damages for the total obliteration of the street could not be maintained. It would be *damnum absque injuria*, loss, not injury—inconvenience, not wrong—to which every citizen must submit, and to something like which every citizen does submit, for the public good.

In *Louisville & Frankfort R. R.* v. *Brown* (17 B. Mon. Ky., 763) it appears that the railroad company, under proper authority, constructed along the center of the street in front of plaintiffs' lot a wall 12 feet in width and 4 feet high, at the western end of the lot; that the erection of the wall had greatly injured their lot and building and impaired their value; that it had deprived them of the use of a greater portion of the street and interfered with the use and enjoyment of the remainder; that the wall had entirely obstructed the crossing of said street in front of their lot and hindered the plaintiffs in their lawful use of the same. After citing numerous authorities to the

effect that no action would lie for such injury, the court said:

> The current of authority upon this point, swelling with the accessions to which the introduction of the railroad system upon an extended scale has given rise in the courts of almost all the States, is unbroken. It may be assumed as true that some portion of every railroad in the Union runs through the street of a city, town, or village, and in all the litigation which has resulted we have met with no case recognizing a different doctrine, except where the general prinicple has been modified by some statutory enactment. Reason and justice, no less than judicial authority, sanction the principle. No right of property is invaded; no property of the appellees has been taken for public use without compensation. Their right to the use of the street, even according to the most comprehensive definition of that right, is held and must be exercised in subjection to the equally well-established right of the municipal power of the town or city to make such appropriation of the streets as, in their opinion, will best promote the interests and business of the local community (pp. 777, 778).

See also *Wolfe* v. *C. L. R. R.*, 15 B. Mon. (Ky.), 404; Cooley Const. Lim. (6th ed.), pp. 473, 666, 669; Dillon Mun. Corps., sec. 987; Sedgwick Stat. and Const. Con. (2d ed.), pp. 456, et seq.

It will be noted that the authorities quoted proceed upon the idea of a *damage* to real estate. In the

very nature of things defendants in error must show something more than damage to bring the suit within the jurisdiction of the court under the act of March 3, 1887. In other words, they can not be content with alleging and proving mere damages arising out of the commission of a tort, but must show that there has been such a taking of *private* property for public use as is inhibited by the fifth amendment to the Constitution. Neither can they, by any evasion in pleading, create an action *ex contractu* out of one purely sounding in tort (149 U. S., 593; 188 id., 400). It has not been alleged, nor can it be presumed as a matter of law, that they possessed any individual property right in a public road of Madison County. Whatever rights that county and the State of Kentucky may have in this thoroughfare need not here be discussed, because they are not parties to this proceeding.

It is submitted that the trial court erred in awarding defendants in error the sum of $750 as damages by reason of the taking of a so-called easement in the county road, and the case should, therefore, be remanded with instructions to revise its judgment accordingly.

JOHN Q. THOMPSON,
Assistant Attorney-General.

P. M. COX,
Assistant Attorney.

O

UNITED STATES *v.* GRIZZARD.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 66. Argued December 6, 1910.—Decided January 3, 1911.

The compensation to be awarded under the Fifth Amendment for an actual physical taking of a part of a distinct tract of land includes not only the market value of the part appropriated, but the damage to the remainder resulting from such taking, embracing injury due to the use to which the part appropriated is to be devoted.

In this case *held* that such damage to the unappropriated portion of the tract included that caused by cutting off access therefrom to the public road by flooding the land actually taken.

In determining the total amount of damages for land appropriated and for damages to remainder, the trial court may divide the total award and specify the amounts for each element of damage, and it is not error if the total award represents the difference between the value of the entire tract before the taking and that of the remainder after the taking. A less sum would not be the just compensation which the Fifth Amendment prescribes.

THE facts are stated in the opinion.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. Assistant Attorney Cox* was on the brief, for the United States:

The closing of public highways, such as streets, roadways and alleys, when done under and pursuant to authority conferred by a valid act, and where there has been no want of reasonable care or skill in the execution of the power, does not constitute a taking of private property within the meaning of the Constitution. This is especially true where ingress and egress to and from land has been closed in but one direction. At most, the damages arising therefrom have been held to be consequen-

tial and not actionable. *United States* v. *Welch*, 217 U. S. 333, does not apply. See Lewis on Eminent Domain (3d ed.), § 202; *Keasy* v. *Louisville*, 4 Dana, 154; *Louisville & Frankfort R. R. Co.* v. *Brown*, 17 B. Mon. (Ky.) 763; *Wolfe* v. *C. L. R. R. Co.*, 15 B. Mon. (Ky.) 404; Cooley, Const. Lim. (6th ed.), pp. 473, 666; Dillon, Mun. Corps., § 987; Sedgwick, Stat. Const. (2d ed.), pp. 456 *et seq.*

Defendants in error must show something more than damage to bring suit within the jurisdiction of the court under the act of March 3, 1887. They cannot be content with alleging and proving mere damages arising out of the commission of a tort, but must show that there has been such a taking of private property for public use as is inhibited by the Fifth Amendment to the Constitution. Neither can they, by any evasion in pleading, create an action *ex contractu* out of one purely sounding in tort. 149 U. S. 593; 188 U. S. 400.

It has not been alleged, nor can it be presumed as a matter of law, that defendants possessed any individual property right in a public road of Madison County. Whatever rights that county and the State of Kentucky may have in this thoroughfare need not here be discussed, because they are not parties to this proceeding.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

Action by the owners of a farm for a taking of a part thereof by the United States for public purposes. Judgment for the plaintiff below.

The farm of the defendants in error lies upon Tates Creek, a tributary of the Kentucky River. For the purpose of improving the navigation of that stream the Gov-

ernment has erected a series of locks and dams. As a consequence the waters of Tates Creek are backed up to such an extent as to flood or submerge a strip of the Grizzard farm, permanently destroying its use for agricultural purposes. The court below, a jury being waived, found that seven and a half acres of land had been actually taken. He then added:

"3. That in addition there is taken an easement of access from plaintiffs' land by way of the county road to the Tates Creek pike.

"4. That the whole land was worth $3,000 before said taking, and what was left after the taking was worth $1,500.

"5. I divide the damage by reason of the taking between the land taken and the easement of access taken equally, *i. e.*, I allow $750 for the land taken, and a like sum of $750 for the easement of access taken.

"I therefore conclude as a matter of law that plaintiffs are entitled to a judgment for $1,500."

The errors assigned relate only to so much of the judgment as allows damages for the "easement of access," referred to in the findings above set out. That there was a taking by flooding permanently the seven and a half acres, valued at $750 by the court below, is not contested. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 323.

The contention is that the "easement of access" destroyed, and therefore, taken, was not a private right of way constituting property such as that for which compensation was allowed in *United States* v. *Welch*, but was a public county road; and reference has been made to the well-known class of cases touching an injury to land not taken by the construction of a railroad along and upon an abutting public road, or a change of grade to the dam-

age of adjacent property, and like indirect injuries to the use of property adjacent but of which no part was taken from the owner. *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Sharp* v. *United States*, 191 U. S. 341.

But here there has been an actual taking by permanently flooding of a part of the farm of the defendants in error. An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same. Since, therefore, there has been a taking of a part of the owners' single tract and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case.

That the petition laid stress upon the flooding of the highway which crossed the flooded land, and sought to recover for a deterioration of an easement in the public road, is not fatal. The damage to the land not appropriated is the obvious consequence of the taking of a part of the whole by flooding—a manner of appropriating which has made the village market, church and school so inconvenient of access as to add some three miles of travel by an unimproved and roundabout country road. Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted. Thus in *Sharp* v. *United States*, 191 U. S. 341, 353, damage resulting to adjacent but distinct parcels was denied because there had been no actual appropriation of any part of such separate parcel, but the principle was conceded as to injury, from the character of the

use of that taken, to that untaken of the same tract. Upon this distinction the court said:

"Upon the facts which we have detailed we think the plaintiff in error was not entitled to recover damages to the land not taken because of the probable use to which the Government would put the land it proposed to take. If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract."

To the same effect see Cooley's Constitutional Limitations, pp. 565–566.

There is nothing in *United States* v. *Welch*, 217 U. S. 333, cited above, which conflicts with the conclusion we have reached, but, upon the contrary, the trend of the opinion is toward the decision we announce.

The constitutional limitation upon the power of eminent domain possessed by the United States is that "private property shall not be taken for public use without just compensation." The "just compensation" thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plaintiffs' farm has depreciated the usefulness and value of the remainder the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into ac-

count both the benefits which accrue and the depreciation which results to the remainder in its use and value. Thus in *Bauman* v. *Ross*, 167 U. S. 548, 574, it is said:

"Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened."

In *Sharp* v. *United States*, 191 U. S. 341, 354, and *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 320, 323, as well as in *United States* v. *Welch*, 217 U. S. 333, the principle is recognized as settled law.

Both the petition and the finding show that access to the public road has been cut off by the intervention of flooded land actually taken.

That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was fifteen hundred dollars, when the value of the entire place before the taking was three thousand dollars. A judgment for a less sum will not be that "just compensation" to which the defendants are entitled. The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the re-

maining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice.

Judgment affirmed.